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20 UNITED STATES OF AMERICA

21 UNITED STATES DISTRICT COURT

22 FOR THE CENTRAL DISTRICT OF CALIFORNIA

23 UNITED STATES OF AMERICA,

24 No. CR 22-195-MEMF

Plaintiff,

OPPOSITION TO MOTION TO DISMISS
THE INDICTMENT; EXHIBITS 1-8
(FILED UNDER SEAL)

v.

KIMBERLY ANN MILETTA,

Hearing Date: Feb. 8, 2024
Hearing Time: 10:00 a.m.
Location: Courtroom 8B

Defendant.

21 Plaintiff United States of America, by and through its counsel
22 of record, the United States Attorney for the Central District of
23 California and Assistant United States Attorneys Jenna Williams and
24 Declan T. Conroy, hereby files its Opposition to Motion to Dismiss
the Indictment.

25 This Opposition to Motion to Dismiss the Indictment is based
26 upon the attached memorandum of points and authorities, the files and
27 //

28 //

1 records in this case, and such further evidence and argument as the
2 Court may permit.

3 Dated: January 19, 2024

Respectfully submitted,

4 E. MARTIN ESTRADA
United States Attorney

5 MACK E. JENKINS
6 Assistant United States Attorney
Chief, Criminal Division

7
8 /s/
9 JENNA WILLIAMS
Assistant United States Attorney

10 Attorneys for Plaintiff
UNITED STATES OF AMERICA

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 From 2013 until she was fired in 2018, defendant Kimberly Ann
4 Miletta ("defendant") abused her position as President of Phoenix
5 Books, Inc. ("Phoenix Books"), her control over Phoenix Books'
6 finances, and the trust placed in her by J.O., the owner of Phoenix
7 Books who also granted defendant power of attorney over her personal
8 checking account, to embezzle over a million dollars for defendant's
9 personal use. For her conduct, defendant is charged with five counts
10 of wire fraud, in violation of 18 U.S.C. § 1343.

11 As part of the investigation into defendant's embezzlement, the
12 government obtained federal search warrants for two of defendant's
13 residences. During the search of those residences, the government
14 seized approximately 41 digital devices and many boxes of paper
15 documents. Upon review of the evidence in those devices and boxes, it
16 became clear that, in addition to her financial crimes, defendant
17 retained proprietary information and intellectual property belonging
18 to Phoenix Books and its owner, J.O. (collectively, the "victims"),
19 after the termination of her employment from Phoenix Books.

20 An attorney for the victims, Matthew Umhofer, contacted the
21 government with a request to obtain copies of property that the
22 government located and seized from defendant's residences during the
23 execution of the search warrants, but that in fact belonged to the
24 victims, and not defendant. That property was important to the
25 victims, because the property that had been improperly retained by
26 defendant (and, after the search warrants, was in the possession of
27 the Federal Bureau of Investigation) included the only copies of
28 important documents and assets that were critical to the operation of

1 Phoenix Books. Accordingly, the victims intended to file a motion
2 under Federal Rule of Criminal Procedure 41(g), which permits “[a]
3 person aggrieved by . . . the deprivation of property” to file a
4 motion for the return of that property. Because the seized property
5 in the FBI’s possession that was the subject of the Rule 41(g) motion
6 did, in fact, belong to the victims, and because the victims further
7 agreed to certain procedures that were designed to protect government
8 resources, the integrity of the investigation, and defendant’s right
9 to privacy related to her own property, the government did not oppose
10 the motion. Defendant was served with the victims’ Rule 41 motion and
11 the government’s response, and was included in correspondence with
12 the Court regarding the motion, but failed to file any objections.

13 Now, despite her failure to raise any objections at the time
14 (which would have been heard and decided upon by a district judge),
15 defendant claims that the government’s actions were so outrageous and
16 unconscionable that the exceedingly rare remedy of dismissal for
17 outrageous government conduct is warranted. That is wrong. First, the
18 government’s response to the victims’ Rule 41 motion was not improper
19 at all, let alone outrageous. To the contrary, it was measured and
20 transparent, and balanced the competing interests at hand, including
21 carefully protecting defendant’s property and privacy. Second, even
22 if the government acted improperly in responding to the Rule 41
23 motion (which it did not), such conduct cannot support a motion to
24 dismiss the indictment because there is no “nexus between [that]
25 conduct and either securing the indictment or procuring the
26 conviction.” United States v. Dominguez-Caicedo, 40 F.4th 938, 949
27 (9th Cir. 2022) (alterations omitted). For those reasons, this Court
28 should deny defendant’s motion to dismiss the indictment.

1 **II. STATEMENT OF FACTS**

2 Phoenix Books is an independent book and audio publisher that is
3 owned by J.O. As part of its business, Phoenix Books acquires rights
4 to literary and other works and sells those works as audiobooks or in
5 other formats. From approximately 2009 to 2018, defendant was the
6 president of Phoenix Books.

7 As the president, defendant had full control over the business,
8 including its finances. In 2018, J.O. had an internal audit performed
9 of the business. As a result of that audit, J.O. discovered that
10 defendant had been misappropriating money for her personal use, and
11 terminated defendant's employment.

12 Mr. Umhofer, an attorney for J.O. and Phoenix Books, reported
13 the suspected criminal conduct to the United States Attorney's
14 Office. The crux of the complaint was that defendant had embezzled
15 over a million dollars from the business for her personal use, and
16 that she had taken and maintained valuable intellectual property and
17 business records. After receiving this complaint and supporting
18 documents, the government began an independent investigation of the
19 alleged criminal activity.

20 In October 2019, during its investigation, the government
21 obtained a federal search warrant for two residences linked to
22 defendant. The affidavit in support of the search warrant detailed
23 probable cause for various offenses, including wire fraud,
24 conspiracy, aggravated identity theft, and theft of trade secrets.

25 During the execution of those warrants, the government seized
26 several boxes of physical documents, as well as approximately 41
27 digital devices, including cell phones, laptops, flash drives, hard
28 drives, and CDs. During the subsequent search of those boxes and

1 devices, agents determined that much of the seized property appeared
2 to belong to Phoenix Books, including legal agreements, book/title
3 inventories, logos, book graphics, manuscripts, emails, and other
4 business records related to Phoenix Books-owned titles.

5 In approximately June 2020, Mr. Umhofer contacted the United
6 States Attorney's Office on the victims' behalf regarding the
7 possibility of obtaining documents and data seized by the government
8 that was the property of Phoenix Books. (Ex. 1 at USAO_00022374,
9 00022379.) This was important to the victims because the property
10 that had been improperly retained by defendant, and which was now in
11 the sole possession of the FBI, included the only copies of important
12 documents and assets that were critical to the operation of Phoenix
13 Books. (Ex. 2 at USAO_0020823-24; Def's Motion to Dismiss (Dkt. 46)
14 ("Mot."), Ex. C at USAO_00001210.)

15 At that time, the government contacted defense counsel to notify
16 defendant of the request and of the government's intent to permit the
17 copying of records, and to provide defense counsel and defendant an
18 opportunity to raise objections to the victims' request. (Ex. 1 at
19 USAO_00022374.) In September 2020, defense counsel requested
20 additional time to consult with defendant regarding the request, and
21 to possibly raise objections. (Id. at USAO_00022375; id. at
22 USAO_00022378-79 (email from defense counsel).) Defense counsel never
23 communicated with the government again on this matter, and never
24 raised any objections. (Id. at USAO_00022375.)

25 Many months later, in April 2021, the victims filed the motion
26 for return of property under Rule 41(g) and a proposed order. (Exs.
27 2, 3.) The government filed its response to the Rule 41 motion in May
28 2021. (Ex. 1.) In its response, the government stated that it did not

1 oppose the relief requested. However, the government set forth in its
2 response that its non-objection was conditioned on the application of
3 specific rules to govern the process of copying and returning
4 documents or data. Those rules were incorporated into the proposed
5 order filed by the victims, and were specifically intended to protect
6 government resources and defendant's privacy. Among other things,
7 those rules required: (1) that the government identify all seized
8 property which appeared to the government to belong to the victims,
9 and provide copies of that information to both the victims and
10 defendant; (2) with respect to electronic data, that the victims
11 provide a storage device onto which the responsive data would be
12 copied and thereafter provided to the victims; and (3) that all
13 scanning of paper documents had to be done under the government's
14 supervision (to protect the integrity of the evidence), but by a
15 vendor to be paid for by the victims. (Id. at USAO_00022374.) With
16 these constraints in place, the government believed that, under the
17 unique circumstances present, the victims' request for return of
18 property was appropriate, as the government viewed Phoenix Books and
19 J.O. as "person[s] aggrieved . . . by the deprivation of property" as
20 contemplated by Rule 41(g). (Id. at USAO_00022375.)

21 The victims' motion and the government's response were served on
22 defendant at the time they were filed. (Ex. 1 at USAO_00022382; Ex. 4
23 at USAO_00022444.) Additionally, before filing its response, the
24 government filed a stipulation to continue the date for a response to
25 the motion, which was also served on defendant. (Ex. 5 at
26 USAO_00022386.) Defense counsel was also copied on communications
27 with the Court regarding the motion. (See Ex. 6.) Defendant never
28

1 filed any position or objections to the Rule 41 motion, or to the
2 government's response to that motion.

3 On May 26, 2021, the Court granted the motion and signed the
4 proposed order submitted by the victims, which included the
5 constraints requested by the government. (Ex. 7.) To effectuate the
6 order, the government provided the victims with copies of their
7 documents or data only, not any data or information belonging to
8 defendant. With respect to digital devices, the government only
9 provided victims with copies of devices that exclusively contained
10 information belonging to the victims. Because the government had only
11 agreed to copy devices in their entirety, rather than going
12 piecemeal, file by file (or text by text, email by email, etc.)
13 through the devices, the government created an inventory of each
14 device that set forth whether the device appeared to contain Phoenix
15 Books proprietary information, defendant's personal information, or
16 both. (See Ex. 8.) A copy of the data on a digital device was only
17 provided to the victims if that device contained exclusively
18 information belonging to the victims. For any digital device that
19 contained defendant's personal information or property, or for any
20 device that contained a mix of the victims' property and defendant's,
21 no copy was provided to the victims.

22 Ultimately, the government's investigation revealed that
23 defendant embezzled over a million dollars from the victims for her
24 own personal benefit, including thousands of dollars for services at
25 a Beverly Hills MedSpa, a pet's veterinary bills, defendant's
26 boyfriend's rent, first class airplane tickets for defendant, and
27 more. In May 2022, defendant was indicted with five counts of wire
28 fraud. (Dkt. 3.)

1 **III. ARGUMENT**

2 **A. The government's conduct surrounding the Rule 41 Motion was
3 not improper, let alone outrageous.**

4 Dismissal of an indictment based on outrageous government
5 conduct is "limited to extreme cases in which the defendant can
6 demonstrate that the government's conduct violates fundamental
7 fairness and is so grossly shocking and so outrageous as to violate
8 the universal sense of justice." United States v. Black, 733 F.3d 294
9 (9th Cir. 2013). For example, government misconduct may warrant
10 dismissal in rare situations where government agents "engineer[] and
11 direct[] a criminal enterprise from start to finish," or use
12 "excessive physical or mental coercion" to convince a defendant to
13 commit a crime. Id. at 302 (quotations omitted). This is an
14 "extremely high standard," id. at 298, and motions to dismiss on
15 these grounds are commonly rejected even in seemingly egregious
16 circumstances, see, e.g., United States v. Fernandez, 388 F.3d 1199,
17 1238-39 (9th Cir. 2004) (no outrageous government conduct where
18 government informant threatened to murder defendant); United States
19 v. Simpson, 813 F.2d 1462, 1465 (9th Cir. 1987) (no outrageous
20 government conduct where government informant engaged in extended
21 sexual relationship with defendant); Black, 733 F.3d at 303, 307 (no
22 outrageous government conduct where government "created and staged"
23 the "fictional" armed robbery at issue). Because of this high bar,
24 the Ninth Circuit has "dismissed an indictment due to outrageous
25 government conduct in a published opinion only once" (and over 50
26 years ago), where the government set up a criminal enterprise from
27 start to finish by "suppl[ying] the equipment and raw material for a
28 bootlegging operation" and being the criminal enterprise's "sole

1 customer." Dominguez-Caicedo, 40 F.4th at 948-49 (describing Greene
2 v. United States, 454 F.2d 783 (9th Cir. 1971)).

3 The government's conduct here was not improper at all, let alone
4 outrageous. The government's response to the victims' request was
5 measured and appropriate, and attempted to balance the various
6 competing interests, including the protection of government
7 resources, the integrity of the investigation, the needs of crime
8 victims, and defendant's right to privacy related to her own
9 property. The victims' request, while unusual, was supported by facts
10 that had arisen during the investigation. Through witness interviews
11 and the search of the residences and digital devices, the government
12 determined that defendant retained significant amounts of property
13 belonging to Phoenix Books, including after her employment had been
14 terminated and Phoenix Books had requested that the materials be
15 returned. Moreover, the victims' attorney represented to the
16 government that the return of the property belonging to the victims
17 was important because such property included the only copies of
18 certain documents and information necessary for the operations of
19 Phoenix Books, or the only copies of valuable assets of the business.
20 (Ex. 2 at USAO_0020823-24; Mot., Ex. C at USAO_00001210.)

21 Accordingly, the government reasonably concluded that the victims had
22 both an ownership interest in, and need for, the requested property.

23 Nevertheless, the government did not just return documents or
24 digital devices en masse to the victims. Instead, the government
25 undertook significant efforts, on its own accord, to ensure that the
26 integrity of the investigation and defendant's privacy rights would
27 be protected. As described above, the government provided copies of
28 these materials, ensuring that all original evidence in the

1 investigation would be preserved. In doing so, the government created
2 an inventory of each device, describing whether the device appeared
3 to contain Phoenix Books proprietary information, defendant's
4 personal information, or both. The government then only provided
5 copies of devices that, in their entirety, exclusively contained
6 Phoenix Books proprietary information. For those devices that
7 contained defendant's personal property, or a mix of defendant's
8 personal property and Phoenix Books property, the government did not
9 provide copies to the victim. Similarly, with paper documents, the
10 government only provided victims with copies of their own property,
11 and did not provide victims with copies of any of defendant's
12 property. Notably, the government provided defendant with a list and
13 copy of every device and paper document for which it provided a copy
14 to the victims under the Rule 41 process and, to date, defendant has
15 not identified a single document or file whose production violates
16 the Court's order or defendant's privacy interests.

17 Moreover, the facts underlying the Rule 41 motion make clear the
18 government was not operating as an arm of Mr. Umhofer or the victims.
19 The government required a court order, to ensure a neutral decision-
20 maker approved of the government's position and plan for the copying
21 and return of property, and to provide defendant an opportunity to
22 raise any objections or concerns. The government ensured that
23 defendant was provided notice and numerous opportunities to object.
24 The victims funded the execution of this unusual request as much as
25 possible, including by providing a vendor to complete the copying of
26 information. In short, the government was in no way "colluding" with
27 the victims; rather, the government acted deliberately,

1 independently, and transparently in managing the victims' request for
2 their property.

3 Defendant's arguments to the contrary lack any merit. First,
4 defendant claims that the government withheld "critical facts" from
5 the Court, including by not properly describing defense counsel's
6 objection to the Rule 41 request. (Mot. at 10-11.) This is
7 demonstrably wrong in several ways. As a preliminary matter, defense
8 counsel did not "object" at all -- he requested more time to consider
9 the Rule 41 request, writing: "I am hereby requesting that you not do
10 [sic] allow any such copying to take place until I have had time to
11 consult with my client and obtain further directions from her and
12 possibly lodge our objections." (Ex. 1 at USAO_00022378.) The
13 government and the victims abided by this request, and the victims
14 waited months before filing their motion. Defendant did not file or
15 otherwise articulate any objections during these intervening months,
16 nor were any such objections ever lodged with the district court.
17 Additionally, when the government did file its position with the
18 court, the government accurately described defendant's position. (See
19 id. at USAO_00022375.) The government was under no obligation to
20 include defense counsel's argumentative characterization of the
21 government as an "adjunct arm" of the victim. Finally, the government
22 attached the entire email from defense counsel as an exhibit, so the
23 Court, did, in fact, receive the entirety of defense counsel's
24 statements on the subject. (Id. at USAO_00022378.)

25 Second, defendant argues that the Court was never informed of
26 the fact that defendant possessed the documents and data at issue
27 "with the year's long consent of [J.O.'s husband], then [J.O.]," and
28 that defendant had "total control of the finances at Phoenix Books,"

1 including access to all of the company's documents and passwords.
2 (Mot. at 9-10.) But neither of these points helps defendant. The
3 Court was informed that defendant had been a long-time employee of
4 the company, and the government has never contended that defendant
5 initial acquisition of the property at issue amounted to theft. The
6 problem, however, was that defendant retained those materials after
7 she was terminated and obligated to give those materials back, and
8 after the company specifically requested that those materials be
9 returned. As for the fact that defendant previously had "total
10 control" over the company property, that is precisely what allowed
11 defendant to carry out the charged crimes, but is ultimately
12 irrelevant when considering whether defendant had a right to retain
13 that property months after her termination. Moreover, had defendant
14 believed that these were critical facts in the proceeding, she easily
15 could have objected or raised these facts with the Court.¹

16 Third, defendant claims that the proposed order submitted by the
17 victims and agreed to by the government contained no "protective
18 portion," so the victims "could have published every page on the
19 internet, to the further prejudice of the defendant." (Mot. at 9, n.
20 3.) Not so. As set forth above, none of defendant's private
21 information or property was provided to the victims. Of course, the
22 victims could conceivably choose to publish their own proprietary
23 information at any time, but that would be of no moment to defendant
24 and would not involve the government in any way.

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27 ¹ Additionally, the supposed "critical" missing fact defendant
28 cites comes from the search warrant affidavit. The fact obviously
does not exonerate defendant, as it was part of the probable cause
determination.

1 Fourth, defendant attempts to argue that the Court had no
2 authority to grant the motion under Rule 41. But the plain language
3 of Rule 41 permits any “person aggrieved” by a “deprivation of
4 property” to move for its return. Fed. R. Crim. P. 41(g). Defendant
5 cites no law that a victim could not be considered a “person
6 aggrieved,” particularly where that victim is the property owner.
7 Regardless, a motion to dismiss for outrageous government conduct is
8 not the proper forum to relitigate a Rule 41 motion that defendant
9 never objected to in the first instance.

10 Finally, defendant argues that it is “unclear when or why the
11 FBI began an investigation” of defendant, and that the victims’
12 prompting was “a major, if not the only, factor.” (Mot. at 7.) But
13 there is absolutely nothing “outrageous” about the government
14 beginning and pursuing an investigation because of a victim’s report
15 of a crime. Here, the government received a detailed report of a
16 crime and performed an independent investigation into that tip.
17 Defendant has not pointed to a single fact, apart from her wholly
18 unmeritorious arguments surrounding the Rule 41 motion, that suggest
19 the government was “colluding” with the victims, or performing
20 anything other than a careful, independent investigation into the
21 defendant’s conduct.

22 **B. The Motion to Dismiss independently fails because it does
23 not establish any nexus between the alleged outrageous
government conduct and securing the indictment.**

24 A claim of outrageous government conduct is “a claim that
25 government conduct in securing an indictment was so shocking to due
26 process values that the indictment must be dismissed.” Dominguez-
27 Caicedo, 40 F.4th at 948-49. “Therefore, in order to secure dismissal
28 of an indictment due to outrageous government conduct, a defendant

1 must show a nexus between the conduct and either securing the
2 indictment or [] procuring the conviction." Id.

3 The fact that certain property was copied and returned to
4 victims under Rule 41 cannot establish a basis for outrageous
5 government conduct because that conduct had zero impact on securing
6 an indictment or conviction in this case. The government obtained
7 this evidence pursuant to a federal search warrant signed by a
8 magistrate judge, demonstrating probable cause to search the relevant
9 properties and devices. Defendant has not challenged that warrant.
10 Whether the government returned copied versions of some of that
11 evidence or not had no impact on the state of the evidence that the
12 government had against defendant.

13 Defendant claims that the return of property under Rule 41 was
14 "prejudicial" to her because J.O. will use the returned material to
15 prepare for trial testimony. (Mot. at 12.) That argument is
16 nonsensical. Whether or not the challenged material is relevant to
17 any future trial testimony from J.O. is irrelevant to the question of
18 whether J.O. had a right to the return of her own property or
19 information. And separately, defendant does not and cannot challenge
20 the government's right to possess such evidence, which includes the
21 right to share such evidence with a potential trial witness to
22 prepare that witness for trial. Additionally, there can be no
23 improper prejudice from J.O. using her own property to prepare for
24 her trial testimony on her own accord, should that be something she
25 chose to do. The preparation of truthful trial testimony is
26 "prejudicial" to defendant only in that it tends to prove her guilty
27 of the charged offenses, which is not the type of unfair prejudice
28 with which a motion for outrageous government conduct is concerned.

1 C.f. United States v. Williams, 445 F.3d 724, 730 (9th Cir. 2006)
2 ("[A]ll evidence suggesting guilt is prejudicial to a defendant. The
3 mere fact that the evidence will damage the defendant's case is not
4 enough—the evidence must be unfairly prejudicial. . .") (internal
5 quotations and alterations omitted). Regardless, defendant was not
6 charged with theft of trade secrets, and the facts underlying the
7 Rule 41 motion (defendant's retention of proprietary business
8 information), though relevant to defendant's knowledge and intent
9 related to her financial misconduct, is not main thrust of the wire
10 fraud charges. Those charges will instead be proven primarily through
11 various financial records and witness testimony surrounding
12 defendant's misuse of the victims' funds.

13 Since there is no link between the alleged outrageous conduct
14 and securing the indictment or conviction in this case, there is no
15 basis for a motion to dismiss. Dominguez-Caicedo, 40 F.4th at 948-49.

16 **IV. CONCLUSION**

17 For the foregoing reasons, the government respectfully requests
18 that this Court deny defendant's Motion to Dismiss the Indictment.
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